PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of JOSEPH ALAN HENDRIX, A Member of the State Bar, No. 131556.	)	Case Nos. 16-O-12123 (16-O-12260)-CV DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Introduction[1]

In this contested disciplinary matter, respondent Joseph Alan Hendrix is charged with five counts of misconduct, including failing to deposit client funds in trust (two counts), misappropriation, failing to promptly disburse client funds, and making a misrepresentation to a client. The court finds respondent culpable of the alleged misconduct and concludes that, despite his lengthy career as a lawyer without prior discipline, a disbarment recommendation is warranted.

Significant Procedural History

The Notice of Disciplinary Charges (NDC) was filed on October 21, 2016. Respondent filed a response to the NDC on December 13, 2016. On respondent's motion, Counts Two and Six of the NDC were dismissed prior to trial.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

On February 10, 2017, the parties filed an extensive stipulation as to facts and culpability. The parties later filed a second stipulation to the admissibility of respondent's character witness statements.

Trial commenced on February 15, 2017. Senior Trial Counsel Drew Massey represented the Office of Chief Trial Counsel (OCTC) of the State Bar of California. Respondent was represented by Kevin Gerry. On the first day of trial, the court granted the parties' oral stipulation to amend amounts reflected in the NDC to be consistent with the amounts listed in the February 10, 2017 stipulation.[2] This matter was submitted for decision on March 3, 2017.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in the State of California on December 14, 1987, and since that time has been a member of the State Bar of California.

Case No. 16-O-12123 – The Logue Matter

Facts

Brian Logue (Logue) hired respondent on March 19, 2012, to handle a personal injury matter. This matter settled in November 2014.

On November 16, 2014, Farmers Insurance issued a check payable to Logue and respondent in the amount of $20,000. Respondent received the check. Of the $20,000 received by respondent, Logue was entitled to $12,212.24. On November 24, 2014, respondent deposited the settlement check into his general business account, located at Wells Fargo Bank, account number XXXXXX5066 (business account #1).

Business account #1 was not a client trust account and was not labeled "Trust Account," "Client's Funds Account," or with words of similar import. Respondent continued to write

[2] The parties stipulated that the $13,333.33 listed in Count Three was actually $12,212.24, and that the $10,000 in Count Five was actually $9,302.39.

checks from business account #1. These checks were issued for respondent's business and other matters not related to Logue. On December 31, 2014, and prior to paying any funds to Logue, business account #1 reached a negative balance of $114.65.

Respondent also maintained a client trust account at Wells Fargo Bank, account number XXXXXX5660 (CTA). On December 31, 2014, the CTA reached a $0 balance. After Logue complained to OCTC, respondent paid Logue in full.

Conclusions

Count One – Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm may be deposited therein or otherwise commingled therewith, except for limited exceptions. By not depositing into his CTA the $20,000 settlement check he received from Farmers Insurance on Logue's behalf, respondent willfully violated rule 4-100(A).

Count Three – § 6106 [Moral Turpitude – Misappropriation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. "'There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]' [Citations omitted.]" (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.)

By intentionally misappropriating $12,212.24 of Logue's funds by failing to turn those funds over to Logue and instead using them for his own purposes, respondent committed an act involving moral turpitude and dishonesty, in willful violation of section 6106.

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Case No. 16-O-12260 – The Bautista Matter

Facts

Raul Bautista (Bautista) hired respondent on November 6, 2012, to represent him in a personal injury matter. This matter settled in April 2015. On April 21, 2015, the opposing counsel sent respondent a check in the amount of $15,000 pursuant to the agreed upon resolution of Bautista's personal injury matter. Of the $15,000, Bautista was entitled to $9,302.39.

On April 22, 2015, respondent deposited the check into a separate business account located at Wells Fargo Bank, account number XXXXXX6411 (business account #2). Business account #2 was not labeled "Trust Account," "Client's Funds Account," or with words of similar import.

On April 23, 2015, respondent transferred $12,000 from business account #2 to his CTA. On April 24, 2015, respondent transferred $3,000 from business account #2 to business account #1. On May 18, 2015, the balance in business account #1 dropped to negative $22.06. (Exh. 5, p. 43.) On May 19, 2015, the balance in business account #2 dropped to $0.

On June 1, 2015, Bautista contacted respondent by email and asked about the status of the settlement funds. On June 2, 2015, respondent replied by email. Respondent stated that the defendant in the civil case "decided to submit this to their insurance carrier for payment so it's been delayed a little bit. I'll let you know as soon as I have your check." Respondent had deposited the check into business account #2 approximately six weeks earlier. At the time he made the statement, respondent knew it was inaccurate.

On June 15, 2015, respondent's CTA dropped to $0. Bautista sent email inquiries to respondent on July 19, 2015; November 17, 2015; December 2, 2015; and February 24, 2016. Respondent did not email Bautista with a response to any of these four emails. He also did not turn over Bautista's funds. Bautista subsequently complained to OCTC.

In or about April 2016 – approximately a year after receiving the settlement funds – respondent paid Bautista in full.

Conclusions

Count Four – Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

By not depositing into his CTA the $15,000 settlement check he received on Bautista's behalf, respondent willfully violated rule 4-100(A).

Count Five – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly]

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. By failing to pay Bautista his $9,302.39 portion of the settlement until April 2016, respondent failed to pay promptly, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in willful violation of rule 4-100(B)(4).[3]

Count Seven – § 6106 [Moral Turpitude – Misrepresentation]

By knowingly misrepresenting to Bautista that the settlement check had not arrived when respondent knew it had arrived and that he had deposited the check six weeks earlier, respondent committed an act involving moral turpitude and dishonesty, in willful violation of section 6106.

Aggravation[4]

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)

Respondent's multiple acts of misconduct constitute an aggravating factor.

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[3] Based on the facts stipulated to by the parties, respondent's testimony, and Exhibit #5, respondent misappropriated $9,302.39 from Bautista. Both of the parties noted in their closing arguments that respondent misappropriated his clients' funds; however, the NDC does not include a misappropriation charge in the Bautista matter.

[4] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Concealment (Std. 1.5(f).)

Respondent testified that he knowingly lied to and avoided his clients in order to conceal the fact that he had misappropriated their funds. As the court has already considered respondent's misrepresentation to Bautista in culpability, the court limits this finding in aggravation to the Logue matter. And while respondent broadly admitted acts of concealment in the Logue matter, it is not clear from the record exactly what those acts were and when they occurred. Consequently, the court assigns limited weight in aggravation to respondent's admitted acts of concealment in the Logue matter.

Uncharged Misconduct (Std. 1.5(h).)

Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered in aggravation where the "evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct [and where the finding of uncharged misconduct] was based on [the attorney's] own testimony . . . ." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.) Here, the parties stipulated to facts establishing that respondent misappropriated $9,302.39 from Bautista. Respondent also testified to this fact. This uncharged misconduct warrants significant consideration in aggravation.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent has been an attorney since 1987 with no record of discipline prior to the misconduct in this matter. The Supreme Court and Review Department have routinely considered the absence of prior discipline in mitigation even when the misconduct was serious. (*Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [mitigative credit given for almost 12 years of discipline-free practice despite intentional misappropriation and commingling]; *Boehme v. State Bar* (1988) 47 Cal.3d 448 [22 years of practice without prior discipline was important mitigating

circumstance despite attorney's intentional misappropriation and lack of candor to court].) Even though the current misconduct is serious, respondent's nearly 27 years of discipline-free conduct prior to the present misconduct is still entitled to significant mitigation. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

Cooperation with OCTC (Std. 1.6(e).)

Respondent entered into an extensive stipulation regarding facts and culpability. Respondent's cooperation preserved court time and resources and warrants significant mitigation credit. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].)

Extreme Emotional/Physical Difficulties and Financial Hardship (Std. 1.6(d).)

Respondent testified that a "confluence of factors" put him "in a bad spot." His wife left home in approximately 2007 after making a career change from attorney to flight attendant, which required her to attend training in Seattle for six weeks, and thereafter she was stationed in Alaska. During this time, respondent paid for her housing expenses and bought her a car. In 2008, the marriage was, for all intents and purposes, over. From then on, respondent lost the benefit of a dual income.[5]

[5] The record is devoid of evidence relating to the extent of the ex-wife's financial contribution to family expenses at that time, and the resulting loss to respondent when she left. In fact, respondent testified that his ex-wife stopped working completely when their children were small, and only returned to work when they became school-aged. Apparently, shortly thereafter, she made the career change and still relied on respondent to assist her with housing and transportation.

In 2008, respondent alone assumed caretaking and financial responsibility for his three minor children (approximate ages 8, 10, and 12).[6] In 2010, divorce papers were filed. And in 2012, the divorce was final.

Respondent further testified that during this same general time period, he suffered a series of professional setbacks. The post-2009 recession caused his business to dry up. He did some contract work taking depositions in prescription drug cases beginning in approximately 2006 on a contingency basis, but, as of the time of the present misconduct, he had not been paid. Also, in about 2011, upon the request of a friend, respondent took over 12 cases from an attorney who suffered a stroke and could no longer practice law. He testified that he lost "a tremendous amount of money" on 10 of the 12 cases given the catastrophic state in which they were left by the original attorney.

Respondent testified that this confluence of factors resulted in severe financial hardship and stress, and ultimately led to threats of foreclosure on his home and eviction from his business. He found he "wasn't in a place where [he] could think clearly" and he was worse off emotionally more than he thought.

While the court is sympathetic to all that respondent has faced, the timing of the present misconduct and its connection to his marital problems is somewhat tenuous. Respondent's divorce was final in 2012, and it was not until the end of 2014 – six years after his wife left and he was denied her income – that he began misappropriating client funds. Also, there was no competent medical/psychological evidence regarding respondent's emotional difficulties and their connection to the present misconduct. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 993 [attorney not entitled to mitigation for emotional difficulties since no expert evidence existed to establish causal connection between attorney's anxiety

[6] Respondent also had two adult step-sons that were mostly out on their own.

disorder and misconduct at issue].) Consequently, the court assigns limited weight to respondent's evidence of emotional and financial difficulties.

Good Character (Std. 1.6(f).)

Respondent presented evidence from nine individuals regarding his good character, including friends, family, and attorney colleagues with whom he has worked over the years. Three of the individuals testified at trial. The other six wrote character letters – one of the which was written by Logue.[7]

Respondent's character witnesses knew him well and were fully apprised of the present misconduct. They commented favorably on his character, reputation for honesty and integrity, and contributions to the legal profession. They further commented that his conduct was out of character, an anomaly, an aberration, and that this was a case of a good man caught in a cash flow bind succumbing to the temptation of temporarily 'borrowing' funds with the intent of replacing them. They characterized his misconduct as a desperate attempt to keep everything together for his children, and noted that respondent is extremely remorseful.

Accordingly, respondent is entitled to significant mitigation for the above evidence of good character.

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

At trial, respondent demonstrated sincere and credible remorse for his misconduct. Respondent testified that he went to his clients' homes and apologized to them face to face. Respondent also paid his clients more than they were originally entitled to receive.

[7] The admissibility of these letters was stipulated to by the parties. However, OCTC later argued that these letters should receive little weight because they were not signed under penalty of perjury and OCTC did not have an opportunity to cross examine these witnesses. If OCTC wished to cross examine these witnesses and had issue with the fact that the letters were not signed under penalty of perjury, it should not have stipulated to their admission.

While these actions were admirable, respondent's remorse was not "spontaneous." Prior to his clients complaining to OCTC, respondent took their funds and intentionally misled them. Respondent did not admit or acknowledge his misconduct until OCTC became involved. Moreover, respondent presented no clear and convincing evidence of any efforts or inability to secure financial assistance from legitimate sources such as family, friends, or filing for bankruptcy. Instead, he turned to his family, friends, and filed for bankruptcy only after the filing of the instant charges. Some of respondent's own character witnesses testified that they would have given him a loan had they known he needed the money. Respondent testified that he did not want to impose on his friends, but he was clearly willing to impose upon his clients and chose to violate fiduciary duties rather than risk rejection, embarrassment, credit repercussions, etc. As such, the court assigns limited mitigation for respondent's remorse and recognition of wrongdoing.

Discussion

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors. And if two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

Standards 2.1(a), 2.2, and 2.11 apply in this matter. The most severe sanction is found at standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory, and may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

OCTC urges the court to disbar respondent from the legal profession. Respondent, on the other hand, advocates a two-year suspension. The court gives significant consideration to respondent's substantial showing in mitigation; however, the severity of the present misconduct is deeply troubling.

While the misappropriation of client funds is extremely serious misconduct, the court is equally concerned by respondent's willingness to lie to his clients to mask his misconduct. Honesty is the fundamental rule of ethics, "without which the profession is worse than valueless in the place it holds in the administration of justice' [citation]." (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

Cases involving client deceit and misappropriation have been known to warrant disbarment. (*Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for nearly $20,000 misappropriation, acts of moral turpitude and dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for $40,000 misappropriation, intentionally misleading client, but mitigation for emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with OCTC]; *Chang v. State Bar*, *supra*, 49 Cal.3d 114 [disbarment for $7,900 misappropriation with fraudulent and contrived misrepresentations].)

Here, respondent has been found culpable of misappropriating $12,212.24 from Logue and lying to Bautista to conceal a second significant misappropriation. Respondent did not take any tangible steps toward returning his clients' funds and making them whole until after they complained to OCTC.

While respondent demonstrated substantial mitigation, this showing was offset, in large part, by the considerable aggravation present. Consequently, respondent has not established "compelling mitigating circumstances [that] clearly predominate," as called for in standard 2.1(a).

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law and standards, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal profession; to maintain high professional standards; and to preserve public confidence in the legal profession.

Recommendations

It is recommended that respondent Joseph Alan Hendrix, State Bar Number 131556, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar of California in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: April 6, 2017

Cynthia Valenzuela
CYNTHIA VALENZUELA
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on April 6, 2017, I deposited a true copy of the following document(s):

ORDER STRIKING RESPONDENT'S MOTION TO RECUSE STATE BAR COURT JUDGES
in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

KEVIN P. GERRY
711 N SOLEDAD ST
SANTA BARBARA, CA 93103 - 2437

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

DREW MASSEY, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on April 6, 2017.

Johnnie Lee Smith
Case Administrator
State Bar Court